FOR ARGUMENT

(8)

No. 95-5015

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LARRY GRANT LONCHAR,
Petitioner,

v.

A.G. THOMAS, WARDEN,
GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State acknowledges that, in seeking dismissal of Lonchar's first federal habeas petition, it cannot rely on any existing rule—statutory or judge-made—that limits the scope of habeas corpus under Section 2254. The State is not directly invoking waiver, exhaustion, procedural default or any other categorical limitation on habeas relief. It repeatedly disavows any reliance on Habeas Rule 9(a) (Resp. Br. at 14, 24, 29), which permits dismissal of a first habeas petition for delay only if a state demonstrates prejudice. It likewise does not invoke 28 U.S.C. § 2244(b) or Habeas Rule 9(b) (Resp. Br. at 14, 24, 25), which on their face authorize dismissal only of successor habeas petitions.

Instead, the State invokes "general principles of equity" (Resp. Br. at 16) to fabricate a basis for dismissing Lonchar's petition by listing a series of circumstances, most of which involved alleged delay, but none of which is legally sufficient to support dismissal under Rule 9(a) in this case. The only circumstances identified by the State that are not integral to its delay argument—waiver and improper motive—are likewise legally insufficient to justify dismissal on this record. Thus, in this case, the State is claiming that the "equitable" whole is somehow more significant than the sum of its legally deficient parts. That cannot be the law.

At bottom, the State is not advocating the application of any recognized equitable doctrines at all. Instead, the State argues for a wide open, *ad hoc* weighing of the particular costs to the state's interests in finality and comity presented by each set of facts, in which a court is essentially free to decide for any reason that a first federal habeas petition should not proceed.[1] The State has not articulated *any* standard to apply in deciding when the costs to finality and comity are sufficiently high to justify dismissal of a first petition. Indeed, respondent is unable even to state whether this inquiry should focus on objective or subjective considerations.[2] Quite apart from the enormous problems of practical administration that would follow upon its adoption, such an approach would gravely threaten the basic traditions and purposes of the Great Writ. It should be firmly rejected.

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[1] *See* Resp. Br. at 23 ("In making the determination of whether it is appropriate to exercise the power provided, the Court necessarily weighs the interest in providing a forum for the vindication of the constitutional rights of state prisoners and the interests of the state in the integrity of its rules and proceedings and the finality of its judgments" (quotations omitted)).

[2] *See* Resp. Br. at 25.

I. THE ELEVENTH CIRCUIT'S PRIMARY RELIANCE ON THE DELAY FACTOR WAS WHOLLY INAPPROPRIATE.

The State does not dispute that delay is at the heart of its argument for dismissal.[3] Nor could it, for the Eleventh Circuit relied in substantial measure on the alleged absence of a "good reason for [Lonchar's] six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition." (J.A. 550). That ruling cannot be affirmed unless the court's reliance on Lonchar's allegedly unexplained delay was justified.

Yet the State concedes that Lonchar's petition cannot be dismissed solely on this ground because Rule 9(a)'s prejudice requirement has not been met.[4] Faced with the obvious difficulty Rule 9(a) poses to its case, the State argues that "[i]t is not *solely* the delay in filing the petition that is abusive, but the delay considered in conjunction with the six years of refusal to participate in legal proceedings, the prior dismissal of his state habeas corpus action, the acts of waiting until hours before his scheduled execution on two separate occasions to file a petition and the stated purpose for the present petition—delay to seek only to change the method of execution." (Resp. Br. at 15) (emphasis added).

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[3] *See* Resp. Br. at 14 ("The obvious delay in this proceeding has been directly attributable to Petitioner's own actions . . ."); *id.* at 28 ("There was no reason for Petitioner refusing to pursue state remedies and to exhaust those state remedies so that he could file a federal petition"); *id.* at 30 ("delay is one of many factors to be considered"); *id.* at 31 ("Delay is . . . an appropriate consideration in weighing the equities in this case").

[4] In the district court, the State reserved the right to seek dismissal on Rule 9(a) grounds in the future, but there is no dispute that the State has not yet made the effort to show prejudice as Rule 9(a) requires, and the State has expressly stated at every level of the judiciary that it is not relying on Rule 9(a) as grounds for dismissal of Lonchar's petition.

Of course, most of these additional considerations simply recast the delay point. The argument that Lonchar refused to authorize the next friend petitions is merely a particularized assertion that Lonchar could have raised his claims sooner. The same is true of the argument that Lonchar voluntarily dismissed his prior state habeas petition. The argument that Lonchar waited until the eve of execution to file is similarly an argument that the petition came too late. Thus, it is doubtful whether the State has presented an argument for dismissal of the petition that is broad enough to avoid the Rule 9(a) problem.

More fundamentally, the State is simply wrong to suggest that even though Lonchar's alleged failure to adduce a "good reason" for delay cannot be dispositive against him, it can weigh heavily against him when considered in conjunction with other factors. Counting unjustified delay as a substantial factor in a "totality of the circumstances" analysis is no less a transgression of Rule 9(a)'s limits on a habeas corpus court's equitable discretion than is counting it as a dispositive factor. In either case, the petitioner is denied federal habeas corpus review on the basis of an allegation of delay, despite the absence of any showing of prejudice.

This conclusion cannot be avoided by arguing that Congress was "silent" as to the consequences of delay in filing habeas petitions. (*See* Resp. Br. at 24). Congress spoke directly and unequivocally to that issue in Rule 9(a). Delay counts against a petitioner when the State demonstrates that it "has been prejudiced in its ability to respond to the petition," and such prejudice must be proved by the State in each instance. 28 U.S.C. § 2254 Rule 9(a) (*see* Pet. Br. at 24-26). A court exercising equitable discretion must respect this specific congressional judgment. Indeed, it has long been established that "the duty of every court of justice, whether of Law or of Equity, [is] to consult the intention of the Legislature. And, in the discharge of this duty, a Court of Equity

is not invested with a larger, or a more liberal, discretion than a Court of Law." I Joseph Story, *Commentaries on Equity Jurisprudence As Administered in England and America* § 14 (1835) (American Law: The Formative Years ed. 1972). There is simply no "gap" in the habeas statutes and rules with respect to the consequences of delay. *See Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *see generally Schlup v. Delo*, 115 S. Ct. 851, 878 (1995) (Scalia, J., dissenting). Thus, there is simply no room for a court to consider delay in the manner proposed by the State.[5]

II. AS A MATTER OF LAW, THE ELEVENTH CIRCUIT'S JUDGMENT CANNOT BE SUPPORTED ON THE GROUNDS OF WAIVER OR IMPROPER MOTIVE.

The State has taken much the same approach to its remaining arguments—waiver and improper motive. Like the State's delay argument, its waiver and motive arguments cannot justify dismissal of Lonchar's petition on the record in this case. For this reason, they should play no part in a "totality of the circumstances" analysis.

Waiver. The State does not argue waiver directly, but seeks instead to wrap waiver into the "totality of the circumstances" analysis by pointing to the district court's findings—including a finding of waiver—which "virtually demanded that the Eleventh Circuit . . . vacate the stay of execution." (*See* Resp. Br. at 27-28). Similarly, the State contends that Lonchar received "[a]mple warnings" that he risked forfeiting his habeas rights by choosing not to proceed earlier. (Resp. Br. at 15).

The State's approach to waiver suffers from exactly the same flaw as its approach to delay. A direct waiver

[5] Rule 9(a) is entirely consistent with traditional equitable principles of laches. *See, e.g., Costello v. United States*, 365 U.S. 265, 282 (1961); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 215 (1963) ("The test of laches is prejudice to the other party").

argument cannot support the Eleventh Circuit's judgment because waiver cannot be found on the facts of this case. It is, therefore, wholly inappropriate to argue that some sort of quasi-waiver is a factor favoring dismissal of Lonchar's petition in a "totality of the circumstances" analysis. A constitutional right cannot be half-waived; waiver is not a concept that can be treated as a matter of degree. Yet that is what the State argues here in order to defend the Eleventh Circuit's legal error in relying on waiver.

To be valid, a waiver must be voluntary, knowing and intelligent. *See Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). It "must have been made with a full awareness of both the nature of the right being abandoned and the *consequences of the decision to abandon it.*" *Moran v. Burbine,* 475 U.S. 412, 421 (1986) (emphasis added). Therefore, to have waived his rights, Lonchar must have clearly understood that the "consequences of the decision" not to authorize the next friend proceedings, or to dismiss his prior state habeas petition, would be a forfeiture of his future right to file a petition in his own behalf.

Precisely the opposite happened in this case. At the very moment Lonchar was answering the question that allegedly formed the predicate for the waiver—indeed, at the conclusion of that questioning—Judge Camp specifically told Lonchar that even if he "abandon[ed]" his claims at that juncture, he could file his own petition "at any time" prior to execution. (J.A. 447) In other words, Judge Camp specifically instructed Lonchar that his decision not to proceed would *not* have the consequence of barring a future decision to press the claims.[6]

[6] Similarly, although Lonchar was warned during the state next friend proceeding that "there may come a time prior to execution in which you could not change that even if you then desired it" (J.A. 433), this colloquy occurred only a few hours before his execution was scheduled to take place. The full transcript of this hearing makes clear that the court was simply warning Lonchar that, as a practical matter, he might not be able to stop the execution if he waited too long before changing his mind—not that his failure to go forward then and there would work a legal forfeiture of his rights.

The same is true with respect to the dismissal of Lonchar's first state habeas petition. It simply cannot be that a voluntary dismissal "without prejudice" waives the dismissed claims. The State nevertheless contends that Lonchar can be penalized for dismissing his petition because he was warned at the hearing preceding dismissal that he risked a waiver should he do so. But that paints a highly misleading picture of what actually transpired. The State did argue that Lonchar's voluntary dismissal should operate as a procedural bar to relitigation in state court, and the court did ask Lonchar whether he understood that risk. But immediately after explaining that dismissal ought to preclude a future state habeas petition, in a part of the colloquy omitted from respondent's brief, counsel for the State said, "[t]hat is where I am asking for the *with* prejudice." (J.A. 467) (emphasis added). Lonchar's counsel argued that dismissal should be without prejudice to any future habeas filings. The court then took the issue under submission, and subsequently dismissed without prejudice. The only plausible interpretation of that action is that the court *rejected* the State's position on waiver. The State obviously read the court's ruling this way. When Lonchar refiled his state habeas petition in June 1995, the State did not argue procedural default. To the contrary, counsel specifically stated that there had been no "specific waiver on the record in any particular proceeding." (J.A. 499).

The State argues that Lonchar has not proved reliance on these representations, and thus cannot invoke estoppel. (*see* Resp. Br. at 32-39). That puts the cart before the

horse. Estoppel would be relevant only if the State first established that, as a matter of law, Lonchar had forfeited his rights, thus putting Lonchar in the position of needing a theory to revive them. But the very question here is whether Lonchar waived his rights, and the answer is that he did not. Reliance, therefore, is irrelevant. And even if it were relevant, the record contains specific evidence that Lonchar was told by counsel that his prior actions would not waive his right to file a petition in the future (J.A. 535-36), thus creating a substantial factual issue whether Lonchar did rely on these representations. The district court conducted no inquiry into, and made no findings on, the reliance issue.

Motive. Petitioner's opening brief demonstrated that a first habeas petition should not be dismissed on the basis of an inquiry into the petitioner's subjective motives so long as the petition contains objectively meritorious claims for relief. (Pet. Br. at 36-38). The State counters that in *Sanders v. United States*, 373 U.S. 1, 18 (1963), this Court expressly endorsed dismissal of a successive habeas petition "whose only purpose is to vex, harass, or delay." (Resp. Br. at 41). But *Sanders* does not stand for the proposition that courts have the power to dismiss an objectively substantial first habeas petition based on a finding about the petitioners' subjective reasons for filing the petition. It was discussing a situation where a petitioner was aware that he had two available claims and had deliberately withheld "one of two grounds . . . at the time of filing his first application, in the hope of being granted two hearings rather than one." 373 U.S. at 18.

Thus, the only inquiry into state of mind contemplated in *Sanders* was a determination whether the petitioner was aware of the claim set forth in a second petition at the time of his first. In such a case, the division of the

claims can *only* have a purpose of achieving delay through piecemeal litigation. But such an inquiry into *knowledge* in a case involving a successive petition is a far cry from what the State seeks here—*i.e.*, a determination that Petitioner's right to pursue a substantial first habeas petition should be cut off because he is doing so for the wrong reason. The State has cited *no* authority for the rather radical proposition that a potentially meritorious, objectively reasonable legal claim can be dismissed based on a finding about a party's ultimate objective for filing.

Even if motive is considered, Lonchar's motives do not justify dismissal. His motive for filing may well have been bound up with his desire to see the law changed to permit organ donation. But that motive may well have been predicated on an assumption that he would receive a death sentence after retrial—an assumption entirely in keeping with the resolutely bleak outlook that characterizes his mental illness. His desire for more time to allow for changing the method of execution, therefore, is not inconsistent with genuinely seeking relief on the merits. Even if there is inconsistency in Lonchar's position, that is simply a manifestation of mental illness. Obviously, if he prevails on the claims he has asserted, and is not resentenced to death, his desire to donate his organs will not require any change in Georgia law. Indeed, had Lonchar's petition been adjudicated with dispatch, as counsel repeatedly requested, he could well have been afforded relief already.

III. THE FACTORS CITED BY THE DISTRICT COURT, EVEN TAKEN AS A WHOLE, DO NOT JUSTIFY A FINDING OF UNCLEAN HANDS.

Quite apart from these clear legal errors, the State's "unclean hands" argument is beset with insuperable difficulties. It is not enough simply to label Lonchar's conduct as "abusive" or "manipulative" to bring it within this

equitable doctrine. A showing of bad faith is the *sine qua non* of unclean hands. *See Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945); *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring); *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1384 (6th Cir. 1995) (unclean hands is conduct that rises "to the level of fraud, deceit, unconscionability, or bad faith"); *see generally* I John N. Pomeroy, *Equity Jurisprudence* § 397 (4th ed. 1918) ("the maxim assumes some degree of moral guilt on the part of the plaintiff").[7] But nothing in the State's "totality of the circumstances" analysis even remotely establishes bad faith.

First, it was not an act of bad faith on Lonchar's part to have waited six years before filing a federal habeas petition. Congress has not imposed a statute of limitations on habeas, and, by eliminating the presumption of prejudice for delays exceeding 5 years in the proposed Rule 9(a) (*see* Pet. Br. at 24-25), made clear that prospective habeas petitioners are under no obligation

[7] Indeed, it is not at all clear that the State's argument falls within traditional equitable notions of "unclean hands." *See Black's Law Dictionary* 1367 (5th ed. 1979) ("Doctrine means no more than that one who has defrauded his adversary in the subject matter of the action will not be heard to assert right in equity"). The equitable rule is that

> only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim, that he is to be barred because of this conduct. "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts."

Dan B. Dobbs, *Handbook on the Law of Remedies* 46 (1973) (quoting *Republic Molding Corporation v. B.W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963)). The State is not making any such claim here. *Cf. American Hosp. Supply v. Hospital Products Ltd.*, 780 F.2d 589, 601 (7th Cir. 1986) (Posner, J.) (doctrine of unclean hands "is not to be used as a loose cannon").

to file their first petitions within any particular time period.

Second, it was not an act of bad faith for Lonchar to refuse to authorize the next friend petitions putatively filed in his behalf. There is simply no evidence (and certainly no factual finding) that Lonchar colluded with his siblings to achieve unwarranted delay by having petitions brought in his behalf and then disowning them. The State nevertheless argues that "the delay and manipulation" resulting from these proceedings "are attributable to the Petitioner." (Resp. Br. at 31). But this argument does not (indeed, it cannot) rest on any claim that Lonchar deliberately sought to forestall his execution. Lonchar, after all, was at the time seeking death. Thus, by definition, Lonchar's conduct cannot amount to abuse and manipulation because he was not seeking to thwart the state's interest in proceeding with the execution.

Indeed, what the State is really challenging is not Lonchar's conduct during the next friend proceedings, but his subsequent change of heart. Yet that change of heart does not amount to bad faith. The State tacitly concedes as much, arguing that even if Lonchar's "intent has not been to manipulate the system, he has done so through his own actions." (Resp. Br. at 16). *See also id.* at 24 (alleging that Lonchar "has *effectively* manipulated the judicial system") (emphasis added)); *id.* at 31 (manipulation is "attributable" to Lonchar). The State is thus arguing manipulative effects, not manipulative intent. The state is, in other words, arguing that Lonchar is disentitled to relief because his conduct has achieved the same effect he could have achieved had he intentionally manipulated the system. But the very point of unclean hands is that it punishes *purposeful* wrongdoing. And there is none here.

Third, it was not bad faith for Lonchar to wait until shortly before his execution to seek habeas relief. Al-

though the Eleventh Circuit described this conduct as "manipulative," and the State deems it "blatant manipulation of the judicial system" (Resp. Br. at 14), the district court conspicuously failed to find any bad faith or manipulative intent in the timing of Lonchar's petition. (J.A. 58). The conduct is plainly not manipulative in the sense that term is typically used in habeas cases—there is no indication here that Lonchar was advancing claims with no prospect of success merely to forestall an inevitable execution. This is not a case, in other words, where the petitioner lacked substantial claims for relief, and waited until the last minute to file the petition in order to obtain a stay merely because the court would lack sufficient time to review the merits prior to the scheduled execution. Nor is it a case in which the petitioner engaged in piecemeal litigation solely to ward off execution of the state's judgment.

The complete explanation for the timing of the petition in this case is that Lonchar finally decided he wanted to live. He simply came to the conclusion that there might be enough potential in his life—that he might be able to do some good—to make his life worth living, and thus decided that he was no longer willing to acquiesce in its termination. As the record shows, he is a seriously mentally ill and troubled person, who has struggled throughout his life with overwhelming suicidal desires, and who in fact attempted to end his life while incarcerated. Whatever one might say about Lonchar's decision to file the petition, it certainly does not amount to bad faith manipulation of the system to achieve a delay that is not justified on the basis of the merits of the petition itself.

Fourth, bad faith cannot be made out on the basis of Lonchar's allegedly improper motives. Here too there is fundamental error because the district court's findings are contradictory. On the one hand, the court found that Lonchar genuinely wished to pursue his claims for relief.

On the other hand, the court found that Lonchar's sole purpose in doing so was to delay his execution. One cannot assert claims for relief that are objectively substantial, and genuinely seek to pursue those claims, and be found to have sought relief "solely" for purposes of delay. Lonchar's purpose, as expressed unequivocally in his testimony in response to Judge Camp's questions in June 1995 (J.A. 513), was to pursue his claims for relief in federal court. That should end the inquiry into bad faith.

IV. THIS COURT SHOULD REJECT THE STANDARDLESS CASE-BY-CASE EQUITABLE APPROACH FOLLOWED BY THE ELEVENTH CIRCUIT.

The facts of this case are truly unique, as the State repeatedly acknowledges. But it is precisely for that reason that permitting adjudication of Lonchar's petition poses no systemic threat to the important interests in finality and comity that loom so large in the State's brief. That is why the State is unable to identify any recognized statute, rule, or equitable doctrine supporting the result below. Indeed, that is why the State has been unable even to find any case directly supporting the result below.

Having acknowledged that "the issue in this case is . . . what standards should govern the exercise of the habeas court's equitable discretion" (Resp. Br. at 22 (quotation omitted)), the State's answer is that *no* standards limit the court's discretion. Precisely because Lonchar's petition cannot be dismissed on the basis of any statute or rule such as Habeas Rule 9, or on the basis of any established categorical limitation such as procedural default, or even on the basis of any traditional equitable principle such as unclean hands, the State is forced to advocate an entirely *ad hoc* weighing of the competing interests and costs presented by each set of facts to come before a habeas court. The ruling below simply cannot be defended on any other basis.

To sanction the Eleventh Circuit's refusal to be bound by the fixed principles that inform and constrain a habeas court's equitable discretion—a refusal that is manifest in that court's belief that it "need not be detained" by such niceties as identifying particular standards, rules, or doctrines to justify dismissal of Lonchar's petition (J.A. 55C) —would "leav[e] district judges 'at large in disposing of applications for a writ of habeas corpus,' creating the danger that they will engage in 'the exercise not of law but of arbitrariness.'" *Kuhlmann v. Wilson*, 477 U.S. 436, 445 (1986) (quoting *Brown v. Allen*, 344 U.S. 443, 497 (1953) (opinion of Frankfurter, J.)). "Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. at 497. For this fundamental reason, the State's position must be rejected.[8]

Finally, even if this Court disagrees with Petitioner, and concludes that some considerations identified below might justify dismissing a first petition in some circumstances, the Eleventh Circuit's judgment must still be vacated and remanded. "It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup v. Delo*, 115 S. Ct. at 870 (O'Connor, J., concurring); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). As demonstrated, the Eleventh Circuit erred as a matter of law in considering Lonchar's failure to provide a "good reason" for not filing sooner, in relying on a finding of waiver, and in considering Lonchar's subjective motive for filing an objectively meritorious petition. Because these legal errors were at the heart of the Court's analysis, the proper course—if this Court does not agree with Petitioner that reversal is required—is a remand for further consideration. *See Schlup v. Delo*, 115 S. Ct. at 869; *id.* at 870 (O'Connor, J., concurring).[9]

[8] *See generally Shondel v. McDermott*, 775 F.2d 859, 867-68 (7th Cir. 1985) (Posner, J.) (contrasting the "careful[ly] qualifi[ed]" discretion of the modern judge exercising equitable discretion with "the moralistic, rule-less, natural-law character of the equity jurisprudence created by the Lord Chancellors of England when the office was filled by clerics").

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded to the district court.

Respectfully submitted,

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[9] The State does not contest that "novelty in procedural requirements cannot be permitted to thwart review." (Resp. Br. at 42-43 (quotation omitted)). Thus, the only disagreement between the parties is whether Lonchar was adequately on notice that his prior decisions not to participate in the next friend proceedings would bar his later efforts to obtain relief in his own behalf. As demonstrated, the State has not advanced a substantial argument on this point.